

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

JAMES K. SQUIRE

FAA Order No. 99-6

Served: August 31, 1999

Docket No. CP97WP0007

DECISION AND ORDER¹

Respondent James K. Squire has appealed from the oral initial decision of former Chief Administrative Law Judge Roy Maurer rendered at the conclusion of a hearing held on August 20, 1997.² In that decision, the law judge held that Mr. Squire had violated 14 C.F.R. §§ 121.317(g), (h) and (k)³, and 49 U.S.C. § 41706,⁴ when he smoked in the

¹ The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 64 Fed. Reg. 43236, 43250 (May 7, 1999).

² An excerpt from the transcript containing the law judge's oral initial decision is attached.

³ It is provided in 14 C.F.R. §§ 121.317 in pertinent part as follows:

(g) No person may smoke while a "No Smoking" sign is lighted or if "No Smoking" placards are posted

(h) No person may smoke in any airplane lavatory.

(k) Each passenger shall comply with instructions given him or her by a crewmember regarding compliance with paragraphs (f), (g), (h), and (l) of this section.

⁴ It is provided in 49 U.S.C. § 41706 in pertinent part as follows:

(a) General. – An individual may not smoke in the passenger cabin or lavatory of an aircraft on a scheduled airline flight segment in air transportation or intrastate air transportation that is –

lavatory on board America West Airlines Flight 1787, from Seattle, Washington, to Las Vegas, Nevada, on March 12, 1996. The law judge assessed a \$719 civil penalty in light of Mr. Squire's limited financial means.⁵

Monique Van Sickle, who was a flight attendant on Flight 1787⁶ that day, testified at the hearing that she made the safety announcement before takeoff. The safety announcement included the following statement: "Please be aware that smoking is not permitted on board this aircraft at any time. Federal regulations prohibit tampering with, disabling or destroying any smoke detector located in the airplane lavatories." (Tr. 14-15.)⁷ Ms. Van Sickle testified that the "No Smoking" signs above the seats were

(1) between places in a State of the United States, the District of Columbia, Puerto Rico, or the Virgin Islands;

(2) between a place in any jurisdiction referred to in clause (1) of this subsection (except Alaska and Hawaii) and a place in any other of those jurisdictions; or

(3)(A) scheduled for not more than 6 hours' duration; and (B)(i) between a place referred to in clause (1) of this subsection (except Alaska and Hawaii) and Alaska or Hawaii; or (ii) between Alaska and Hawaii.

⁵ Complainant sought a \$2,000 civil penalty for these violations. Mr. Squire testified that he had been unemployed for 4 to 5 years, and that he is dependent upon his Social Security Disability Income (SSDI) payments, which total \$719 per month.

⁶ Flight 1787's duration is usually about 1 hour and 30 – 40 minutes. The flight lasted approximately that length of time on March 12, 1996.

⁷ See 14 C.F.R. § 121.571(a)(1)(i) which provides in pertinent part:

Before each takeoff ... (i) *Smoking*. Each passenger shall be briefed on when, where, and under what conditions smoking is prohibited This briefing shall include a statement that the Federal Aviation Regulations require passenger compliance with the lighted passenger information signs, posted placards, areas designated for safety purposes as no smoking areas, and crewmember instructions with regard to these items. The briefing shall also include a statement that Federal law prohibits tampering with, disabling, or destroying any smoke detector in an airplane lavatory; smoking in lavatories; and when applicable, smoking in passenger compartments.

illuminated throughout the flight.⁸ In addition, she testified, there were "No Smoking" placards on the lavatory doors inside the lavatories.⁹ Ms. Van Sickle's testimony was confirmed by another flight attendant who testified at the hearing, Trisha Davis.

Approximately 40 minutes after takeoff, as Ms. Davis and Ms. Van Sickle were pushing the beverage cart toward the back galley after the beverage service, they smelled cigarette smoke. They checked the aft cabin lavatories, which on this aircraft (an Airbus), were at the back of the aircraft between the last row of seats and the galley. Ms. Van Sickle knocked on a lavatory door and a passenger, Mr. Squire, exited. According to the flight attendants, the smell of cigarette smoke became more evident when the door was opened.¹⁰ When Ms. Van Sickle asked Mr. Squire if he had been smoking in the lavatory, he replied that he had and that he had flushed the cigarette down the toilet.

Ms. Van Sickle testified that the smoke detector in the lavatory did not go off during this incident and that she assumed, as a result, that Mr. Squire had tampered with or covered the smoke detector. The flight attendants did not observe any physical evidence of tampering with the lavatory smoke detector.

⁸ See 14 C.F.R. § 121.317(c), which provides in pertinent part that "[n]o person may operate an aircraft on a flight segment on which smoking is prohibited unless the 'No Smoking' passenger information signs are lighted during the entire flight segment, or one or more 'No Smoking' placards ... are posted during the entire flight segment."

⁹ See 14 C.F.R. § 121.317(e) which provides in pertinent part that "[n]o person may operate an airplane unless there is installed in each lavatory a sign or placard that reads: 'Federal law provides for a penalty of up to \$2,000 for tampering with the smoke detector installed in this lavatory.'"

¹⁰ Ms. Van Sickle noticed that the smell of cigarette smoke emanating from the lavatory became stronger when the door was opened; however, she did not notice a puff of smoke come out of the lavatory when Mr. Squire opened the door.

Mr. Squire, who represented himself at the hearing, testified that he had not smoked in the lavatory. He testified that he had been in the lavatory only a short time before he heard a pounding at the door. He claimed that the flight attendants were loud and obnoxious when they accused him of smoking and that he only "admitted" to smoking in the lavatory to prevent a public scene. He also denied tampering with the smoke alarm. Mr. Squire admitted that he had been a heavy smoker at the time, and he suggested that the flight attendants merely had smelled the heavy odor of smoke that clung to his clothing. He argued that the failure of the smoke detector to go off proved that he had not been smoking in the lavatory.

Mr. Squire testified that on the day of this flight he did not know that smoking was prohibited in the lavatory. He said that he did not hear the preflight safety announcement because he has a hearing loss and has difficulty hearing when there is any background noise. He introduced a report of findings from an audiological evaluation from the Conner Hearing Aid Clinic; the report contains raw data only and no interpretation of the findings or description of Mr. Squire's ability to hear in the presence of background noise.

Ms. Davis testified that when they landed in Las Vegas, she deplaned after the last passenger. She said that as she walked down the terminal walkway, she overheard Mr. Squire tell a woman that he smoked in aircraft lavatories all the time.

Ellen Salb Steeb, an FAA cabin safety inspector, testified about the dangers associated with in-flight fires. She explained that smoking in the aircraft lavatory is especially dangerous because a fire that starts in the lavatory is hidden. In addition, the

lavatory is filled with paper supplies, and there are electrical wiring systems and fuel lines behind the panels in the lavatory.

The law judge held as follows:

Now, I'm going to make a credibility choice in this matter in favor of the two flight attendants. And I'm going to specifically find that on or about March 12, 1996, Respondent was a ticketed passenger aboard America West Airlines Flight 1787 from Seattle, Washington to Las Vegas, Nevada. And while the passenger information "No Smoking" signs were lighted and "No Smoking" placards posted, the Respondent did in fact smoke in the aircraft lavatory.

I also find that "No Smoking" placard signs were posted throughout the aircraft, including the lavatory. I also find that during the passenger briefing prior to the flight passengers were advised of the regulations against smoking in the airplane lavatory. And I am also in this regard mindful that the Respondent does have some documented hearing loss and he's testified that when there is background noise he is unable to hear and perhaps did not hear this announcement.

But nonetheless, I'm going to make the finding that the passengers were advised of the regulations against smoking in the airplane lavatory. It is unknown by me whether this Respondent in fact heard this advice, but in any event it was made.

(Tr. 67-68).

On appeal, Mr. Squire argues that the case should be dismissed because the law judge did not grant his request for appointment of counsel.¹¹ Mr. Squire notes that he could not afford to hire counsel. This argument must be rejected. As has been held previously, there is no right to assigned counsel in FAA civil penalty proceedings. In the

¹¹ In denying the request for appointment of counsel, the law judge explained to Mr. Squire at the hearing:

This is a civil proceeding. The only thing at issue here – in other words, your freedom is not at issue here, it's your bank account or your bucks. That's the only thing the FAA is seeking to tap into here.

(Tr. 4.)

Matter of Alphin Aircraft, Inc., FAA Order No. 97-9 at 9-10 (February 20, 1997); In the Matter of Pacific Aviation International, Inc., FAA Order No. 97-8 at 9 (February 20, 1997).

Mr. Squire argues further on appeal that he was misled by the law judge when the law judge stated at the hearing that the FAA only accused him of smoking on the airplane. Mr. Squire wrote: "After this statement by Judge Maurer I defended myself against the charge of smoking. Yet at the end of the case the Judge found me guilty of several charges" (Appeal Brief at 2.)

This argument, likewise, must be rejected. During his cross-examination of Ellen Salb Steeb, Mr. Squire questioned Ms. Steeb about the location of the smoke detector in the lavatory. When the agency attorney objected to the relevance of this line of questioning, the law judge explained, "It doesn't matter. You're not charged with tampering with the smoke detector anyway, just smoking." (Tr. 50.) The law judge was correct because Complainant had not alleged that Mr. Squire had violated 14 C.F.R. § 121.317(i), which provides that "No person may tamper with, disable, or destroy any smoke detector installed in any airplane lavatory." It is clear that the law judge's remark was a narrow one, and it is unreasonable to interpret his statement as suggesting that the elements of the regulations and statutory provision allegedly violated did not have to be addressed. Moreover, Mr. Squire did testify that he could not have heard the safety announcement because of his hearing loss (Tr. 59) and that he had had no idea that there was a smoke detector on the airplane (Tr. 57.)¹²

¹² Also, in the beginning of the hearing, when the law judge reviewed the allegations of the Complaint with Mr. Squire, Mr. Squire admitted that the "No Smoking" signs were "up and running," but denied that there were "No Smoking" placards posted in the aircraft cabin or lavatory.

Mr. Squire challenges the law judge's finding that he smoked in the aircraft lavatory. He argues in his appeal brief that Ms. Davis was not a credible witness because there is a discrepancy between Ms. Davis's testimony and a prehearing description of her expected testimony regarding where she overheard him say that he smoked on aircraft all the time. He also questions her credibility, arguing that he has never seen a flight attendant deplane with the passengers.

The law judge made a credibility assessment in favor of the flight attendants, finding their testimony to be more truthful than that of Mr. Squire. The law judge's credibility findings are entitled to deference on appeal. In the Matter of General Aviation, FAA Order No. 98-18 at 15 (October 9, 1998). Deference is given to a law judge's credibility findings because the law judge is in the best position to observe the demeanor of witnesses at a hearing. In the Matter of Trans World Airlines, FAA Order No. 98-11 at 11 (June 16, 1998). None of the arguments made by Mr. Squire suffice to compel the Administrator on review to reverse the law judge's credibility assessment. The discrepancy between the pre-hearing discovery submission summarizing Ms. Davis' testimony and her actual testimony regarding where Ms. Davis was when she overheard Mr. Squire boast that he smokes on aircraft all the time is minor. Moreover, even if Ms. Davis' testimony were disregarded, the outcome of this case would be the same. What is compelling in this case is that the flight attendants smelled smoke coming from an aft lavatory and that the smell got stronger when Mr. Squire opened the lavatory door. Moreover, Mr. Squire admitted to the flight attendants that he had been smoking in the lavatory and had flushed the cigarette down the toilet. If anything, it is Mr. Squire's *post hoc* rationalization that he only told the flight attendants that he had been smoking in the

lavatory to prevent a public scene that lacks credibility. The flight attendants were quite clear that the smoke that they smelled was stronger than simply the odor of smoke that clings to a smoker's clothes even after the smoker has finished smoking.

The failure of the smoke alarm to alert is disturbing. Certainly, it is possible, and perhaps even likely, that Mr. Squire covered or otherwise tampered with the smoke detector. It is also possible that the smoke detector was inoperative for another reason. However, the failure of the smoke alarm to alert does not sink Complainant's case. It was not necessary for Complainant to prove its case beyond a reasonable doubt. In the Matter of Terry and Menne, FAA Order No. 91-12 at 6 (April 12, 1991). While the question about the smoke detector remains, nonetheless, Complainant sustained its burden of proof, to prove its case by the preponderance of the reliable, probative and substantial evidence. 14 C.F.R. §§ 13.223 and 13.224.

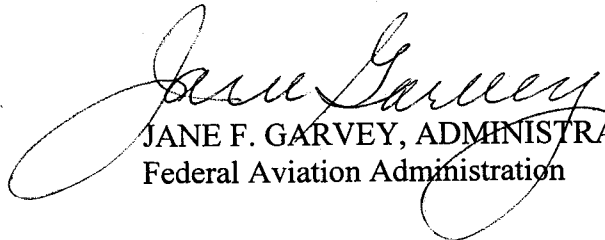
Mr. Squire argues on appeal that the law judge failed to consider Mr. Squire's hearing impairment. That is not accurate. The law judge was aware that Mr. Squire has a "documented hearing loss" and of Mr. Squire's testimony regarding his difficulty in hearing in the presence of background noise. However, the law judge apparently did not find that evidence to be sufficient to prove that Mr. Squire did not hear the announcement. The law judge stated in his decision, "It is unknown by me whether this Respondent in fact heard this advice [the safety announcement advising the passengers of the prohibition against smoking in the lavatory]."

The evidence concerning Mr. Squire's hearing loss was not sufficient to prove that he did not hear the announcement. The document from the Conner Hearing Clinic consists solely of raw data from an audiological evaluation, and without any expert

testimony or interpretation of that data, the report is of little use in this proceeding. In other words, the Administrator cannot evaluate the test results to determine their significance. Moreover, Mr. Squire had no apparent difficulty in hearing the flight attendants when they spoke with him during the flight, and no apparent hearing problems during the hearing. (Tr. 18-19, 59.)¹³

The risks of smoking in an aircraft lavatory were well-described by the FAA's expert at the hearing. As a result of these risks, smoking in an aircraft lavatory constitutes a serious violation. In light of the of signs, placards and safety announcements regarding the prohibition against smoking on that flight in general, and in the lavatory in particular, Mr. Squire's smoking in the lavatory is inexcusable and reckless.

THEREFORE, Mr. Squire's appeal from the law judge's oral initial decision is denied. A civil penalty of \$719 is assessed.¹⁴


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 23rd day of August, 1999.

¹³ We will leave for another day the question whether a hearing impairment that prevents a passenger from hearing the preflight safety announcement or any other instruction from a crewmember constitutes a defense to 14 C.F.R. § 121.317(k).

¹⁴ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1998).